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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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# No. 669

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HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
*Petitioner,*

*vs.*

FAIRMONT SUPPLY COMPANY, A CORPORATION.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

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# INDEX.

## Subject Index.


| | Page |
|---|---|
| I. Opinions of courts below | 2 |
| II. Jurisdiction | 2 |
| III. Summary statement of the matters involved | 2 |
| IV. Specification of errors | 8 |
| V. Questions presented | 9 |
| VI. Contentions of petitioner | 10 |
| VII. Federal question | 16 |
| VIII. Finality of Judgment | 18 |
| IX. Reasons relied upon for requested allowance of writ | 20 |
| Appendix | 22 |


## Cases.


| | |
|---|---|
| *Anderson* v. *Cronkleton*, 32 F. (2d) 170, 171 | 11 |
| *Bowers, Collector of Internal Revenue* v. *American Surety Co.*, 30 F. (2d) 244 | 14 |
| *Brewster* v. *Gage* (1929), 280 U. S. 327, 336 | 12 |
| *Brown-Crummer Inv. Co. of Wichita, Kan., et al.* v. *City of Florala, Ala., et al.*, 55 F. (2d) 243 | 14 |
| *Clark, Rec.* v. *Williard et al.*, 292 U. S. 112 | 20 |
| *Coleman-Bush Inv. Co.* v. *Figg*, 95 Ky. 403, 25 S. W. 888 | 15 |
| *Commonwealth* v. *Southern Pac. Co.*, 105 S. W. 466-468 | 14 |
| *Copple* v. *Morrison* (Iowa, 1935), 264 N. W. 113, 115 | 15 |
| *Earle* v. *Pennsylvania*, 178 U. S. 449, 455 | 11 |
| *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 | 13 |
| *Ex parte Tiffany* (1920), 252 U. S. 32 | 19 |
| *Fatjo* v. *Swasey*, 111 Calif. 628, 44 Pac. 225 | 15 |
| *First Trust Co.* v. *Airedale Ranch & Cattle Co.* (Nebr., 1939), 286 N. W. 766, 771 | 15 |
| *Fish* v. *Olin* (Vt.), 56 Atl. 533, 534, 76 Vt. 120 | 11 |
| *Forgay et al.* v. *Conrad*, 6 How. 200, 204 | 18 |
| *Freeman* v. *Prendergast*, 94 Ga. 369, 21 S. E. 837, 844 | 15 |

Page

*Gregory* v. *Merchants State Bank* (Tenn., 1939), 135 S. W. (2d) 465, 474 ..... 15
*Gumbel* v. *Pitkin*, 113 U. S. 545 ..... 20
*Haggin* v. *Straus*, 148 Ky. 140, 146 S. W. 391, 395 ..... 15
*Heath* v. *Wallace* (1891), 138 U. S. 573, 582 ..... 12
*Inland Waterways Corp.* v. *Young* (1940), 309 U. S. 517, 524 ..... 12
*In re Doe's Will* (Wisc., 1939), 285 N. W. 764, 767 ..... 15
*Kennedy* v. *Gibson, et al.* (1869), 8 Wall. 498, 506 ..... 11
*Lahey* v. *Kartright* (Court of Appeals, N. Y., 1892), 132 N. Y. 450, 30 N. E. 989, 990 ..... 15
*McCallum* v. *Wing* (C. C. A. 1st, 1929), 30 F. (2d) 505, 510 ..... 16
*Parkhill* v. *Doggett*, 135 Is. 113, 112 N. W. 189, 190 ..... 15
*Rawlings* v. *Ray* (1941), 312 U. S. 96, 99 ..... 12
*Rhinehart, Receiver* v. *Ireland*, 120 W. Va. 599, 199 S. E. 871 ..... 7
*Rio Grande Ry.* v. *Stringham*, 239 U. S. 44 ..... 20
*Royce* v. *Adams*, 123 N. Y. 402, 25 N. E. 386 ..... 15
*Sadler, Overseer of Poor* v. *Jeppson*, 82 Atl. 316-317 ..... 14
*Safe Deposit & Trust Co.* v. *Ellis*, 136 Md. 334, 110 Atl. 481, 483 ..... 15
*Scott* v. *Armstrong*, 146 U. S. 499, 506 ..... 11
*Seabury, Receiver* v. *Green* (1935), 294 U. S. 165, 168 ..... 17
*Stearns* v. *Fraleigh*, 39 Fla. 603, 23 So. 18, 21 ..... 15
*Stokes* v. *Amerman* (Sup. Ct. N. Y., 1889), 7 N. Y. S. 733, 734 ..... 15
*Strite* v. *Wolf*, 268 Pa. 221, 110 Atl. 753, 754 ..... 15
*Thomas B. Bishop Co.* v. *Santa Barbara County, et al.*, 96 F. (2d) 199-203 ..... 14
*Thomas* v. *Nat. Bank of Commerce* (Wash., 1936), 60 Pac. (2d) 264, 269 ..... 15
*Thomson* v. *Dean*, 7 Wallace 342, 345 ..... 19
*Toronto General Trust Co.* v. *Chicago, B. & Q. R. Co.*, 123 N. Y. 37, 25 N. E. 198, 200 ..... 15
*United States* v. *Jackson* (1929), 280 U. S. 183, 193 ..... 12
*Wooldridge* v. *Planters Bank*, 1 Sneed (Tenn.), 297, 302 ..... 15

STATUTES.

Page

Section 237(b) of the Judicial Code (U. S. C., title 28, c. 9, Sec. 344(b) ..... 2, 16, 18, 24

Section 5234 of the Rev. Stats. (U. S. C., title 12, ch. 2, Sec. 192) ..... 4, 10, 22

Act of March 29, 1886 (U. S. C., title 12, ch. 2, Secs. 198-200) (Appendix) ..... 11, 12, 22, 23

Act of Congress of February 13, 1925 (U. S. C., title 28, Sec. 780) (Appendix) ..... 14, 24

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FAIRMONT SUPPLY COMPANY, A CORPORATION.

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**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.**

---

*To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:*

Your petitioner, Howard Hardesty, as Receiver of The National Bank of Fairmont, West Virginia, respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Appeals of West Virginia, rendered in the above entitled cause on March 15, 1941 (R. 142), rehearing of which was denied May 19, 1941 (R. 167), reversing the judgment of the Circuit Court of Marion County, West Virginia (R. 137-141).

## I.

### Opinions of Courts Below.

The judgment of the Circuit Court of Marion County, West Virginia, (R. 137-141) is not reported. The judgment of the Supreme Court of Appeals of West Virginia appears in the Record at page 142. The opinion of that court (R. 143-149) is reported in 14 S. E. (2d) 436, and its order denying rehearing, entered May 19, 1941, appears in the Record at page 167.

## II.

### Jurisdiction.

The time for filing petition for writ of *certiorari* was, by appropriate orders of this Honorable Court, extended to and including September 29, 1941.

Jurisdiction to review the aforesaid judgment of the Supreme Court of Appeals of West Virginia is granted by Section 237(b) of the Judicial Code (U. S. C. title 28, c. 9, sec. 344(b)) providing for the granting of a writ of *certiorari* by this Court to review a final judgment or decree of the highest court of a state in which a decision could be had in which a right, title or privilege is claimed under a statute of the United States.

As will more fully hereinafter appear, petitioner, as Receiver of said national bank, claims, under the national banking laws, the rights, titles and privileges by him asserted and relied upon in the aforesaid cause by him filed.

## III.

### Summary Statement of the Matters Involved.

Your petitioner, as Receiver of The National Bank of Fairmont, West Virginia, filed suit (R. 1-16) in the Circuit Court of Marion County, West Virginia, against re-

spondent to compel it to perform its contract to purchase from your petitioner, as Receiver of said bank, certain real property constituting assets of the receivership. Petitioner's Bill of Complaint in said court filed, alleged, in substance:

That your petitioner's predecessor, one Robert C. Miller, had, as receiver of said bank, obtained judgment against a debtor of the bank, and thereafter said Miller, as such receiver, filed proceedings to cause the sale of certain real estate belonging to said debtor and to have the proceeds thereof applied towards satisfaction of said judgment (R. 6-10). At the sale of said property by the Special Commissioner appointed by the court for that purpose, said Miller, as such receiver, in pursuance of instructions from the Comptroller of the Currency, and as permitted by the Act of Congress of March 29, 1886 (U. S. C. title 12, c. 2, sections 198-200; appendix, pp. 22, 23, see discussion, *infra,* p. 11) purchased said real estate (R. 10) and the proceeds of the purchase price were duly credited upon said judgment (R. 11). The Special Commissioner, by direction of the court, upon confirmance of said sale, executed deeds of said real estate to said Miller. (The bill of complaint, paragraph VI (R. 11) states that the property was conveyed by said deeds to "R. C. Miller, Receiver * * *", but Exhibits P-S, referred to in said paragraph, show (R. 69-80) that the full name, "Robert C. Miller", was used in said deeds, so that the Special Commissioner's deeds ran to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association".)

That the sale of said real estate to said Miller was: (R. 169)

> "in fact made to said R. C. Miller in his capacity as Receiver of said The National Bank of Fairmont, and which purchase money was in fact paid by said Re-

> ceiver as such from the funds of said The National Bank of Fairmont."

(*The above quoted allegation contained in the bill of complaint was, through inadvertence, omitted from the transcript of record sent to the Supreme Court of Appeals. This omission apparently accounts for the following statement appearing in the opinion of the Supreme Court of Appeals*: (R. 144)

> "It does not clearly appear that the purchase price was paid out of funds belonging to the insolvent banking association."

*However, said allegation was brought to the attention of the court in the petition for rehearing* (R. 158), *and as will appear from the stipulation of counsel* (R. 169) *said allegation was thereafter specifically brought to the attention of the appellate court and the court thereupon indicated, in substance, that even had the omitted allegation been included in the original transcript, it would not have influenced the court to reach a different decision* (R. 171).)

That thereafter said Miller died, and petitioner was appointed successor receiver of said bank.

In due course, petitioner, by direction of the Comptroller of the Currency (R. 12), sold said real estate to respondent, —Fairmont Supply Company, a corporation,—and a written contract covering said sale was executed by your petitioner, as receiver, and by respondent, and a payment on account was made, the balance to be paid in due course at the closing of the transaction (R. 12; R. 80). Said sale by petitioner was duly approved by the Circuit Court of Marion County, West Virginia, in accordance with the requirements of U. S. C. title 12, sec. 192 (R. 13). Thereupon petitioner tendered respondent appropriate receiver's deeds purporting to convey said property to respondent. Respondent refused to complete the sale on the ground that

petitioner's title, as receiver, was defective, for the reasons hereinafter indicated.

Petitioner, as receiver of said bank, thereupon filed the bill of complaint in the instant case in the Circuit Court of Marion County, West Virginia, to compel specific performance, setting forth, in detail, the previous court proceedings covering the purchase and acquisition of title of said property by said Miller, as receiver, and the subsequent sale of the property by petitioner, as successor receiver, to Fairmont Supply Company.

Respondent demurred to petitioner's bill of complaint (R. 133-137) and therein set up by way of defense that petitioner's bill of complaint did not show that petitioner had such title to said real estate as would enable him to "institute, prosecute and maintain this chancery cause against said defendant" (R. 133), and hence that "defendant as such purchaser would acquire no title or interest in said real estate by acceptance of any deed from said plaintiff."

As grounds for the defense thus made by said demurrer, respondent therein contended:

(a) Said deeds of the Special Commissioner should have conveyed said property to "The National Bank of Fairmont" (R. 136, numbered paragraph 9) and that in the language of said deeds purporting to convey title to said property to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association," the words "Receiver of The National Bank of Fairmont, an insolvent national banking association," were merely descriptive words of Robert C. Miller (R. 135, numbered paragraph 4), and "that by virtue of such conveyances the legal title and equitable title to said real estate vested in Robert C. Miller, individually, and that by reason thereof, neither the said Robert C. Miller in his capacity as Receiver of said The National Bank of Fair-

mont, nor the said bank itself, acquired any title to said real estate, either legal or equitable" (R. 134, numbered paragraph 2).

(b) That upon the death of said former Receiver, the title to said real estate passed and vested in the heirs at law of said Miller (R. 134, numbered paragraph 4).

(c) That even:

> "if it could be legally established that some title or interest in said real estate did pass to and vest in the said Robert C. Miller in his fiduciary capacity as Receiver of said The National Bank of Fairmont, the same has not been by any instrument or operation of law, or in any other way, transferred or vested in said plaintiff, as successor Receiver to the said Robert C. Miller, Receiver of said The National Bank of Fairmont." (R. 134, numbered paragraph 3)

The Circuit Court of Marion County, West Virginia, overruled respondent's demurrer to petitioner's Bill of Complaint, and in effect held that said Robert C. Miller, as Receiver of said bank, had, by said deeds from said Special Commissioner, acquired good title to said real estate in his official capacity as Receiver of said bank, and that Howard Hardesty, your petitioner, as successor Receiver of said bank, obtained good title to said property and could convey good title thereof to the Fairmont Supply Company, as the purchaser thereof from petitioner at the aforesaid auction sale.

**Decision of Supreme Court of Appeals of West Virginia.**

(The scope and application of the points and issues passed upon and decided in the opinion of the court below, can be fully appreciated only in light of the points certified to that court and enumerated in the "certification order" (R. 2-4). Hence, in enumerating the decided points, reference

will be made, in some instances, to the certified points by way of comment or explanation.)

The Supreme Court of Appeals of the State of West Virginia reversed the Circuit Court and sustained, substantially *in toto,* the points raised in respondent's demurrer. That court held, in effect, that the deeds from the Special Commissioner to Miller, the predecessor receiver, conveyed the title to said property to Miller individually, and not to him in his representative capacity on behalf of the bank, and further, that even if it be assumed that title had passed to Miller in his representative capacity as receiver, said title did not, after the death of Miller and upon the appointment of petitioner, pass to petitioner as receiver, inasmuch as there was no provision in the national banking laws for passage of title by operation of law, from a receiver of a national bank to a successor receiver. More specifically, the court held:

(1) In considering the questions presented, consideration must be given to the effect of appointment of a Receiver of a national bank and the authority and powers of the Receiver so appointed (R. 145).

(2) An insolvent national bank does not lose its corporate existence upon the appointment of a Receiver, and the bank may still enter into transactions not forbidden by law (R. 146).

(3) In the light of the West Virginia case of *Rhinehart, Receiver* v. *Ireland,* 120 W. Va. 599, 199 S. E. 871, a receiver of a state bank has authority to take title in his own name in his official capacity to property purchased by him on behalf of his receivership, but a state bank receiver has "wider powers than those given to the receiver of a national bank. The receiver of a national bank is an agent whose authority is limited by law." (R. 147-148)

(4) Under the law of West Virginia,—"where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually" (R. 147).

Hence, notwithstanding Receiver Miller "was apparently acting in a fiduciary capacity as Receiver of the bank" and even "if he used the funds of his trust in purchasing said real estate" (R. 148), the deeds purporting to convey title to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association" had the effect of conveying legal title to Robert C. Miller, individually.

(Point 3, as certified to the court below, was to the effect (R. 3) that even if it were assumed that title did pass to said Robert C. Miller in his fiduciary capacity as receiver, "there is no statutory provision, *either Federal or State*, transferring legal or equitable title for real estate from a receiver of a Federal bank to a successor receiver of a Federal bank.")

The decision of the court below upon the foregoing certified point was as follows:

(5) There is no "statute which authorizes the receiver of a national banking association to take title from his deceased predecessor by operation of law. There being no such statutory provision, the legal title, upon the death of Miller, passed to his heirs by the laws of descent prevailing in this jurisdiction." (R. 148)

## IV.

### Specification of Errors.

The court below erred in holding:

(1) That the deeds of the Special Commissioner purporting to convey the real property to "Robert C. Miller, Re-

ceiver of The National Bank of Fairmont, an insolvent national banking association," conveyed legal title of the property of said Miller individually, and not to said Miller in his fiduciary or representative capacity as receiver of said bank.

(2) That under the National Banking Law said Robert C. Miller, as Receiver of said bank, did not have authority to take title to said property, on behalf of and for the benefit of the bank, in his own name in his representative or fiduciary capacity as such receiver.

(3) That even if it be assumed, for discussion, that legal title to said property did pass to said Robert C. Miller, in his fiduciary or representative capacity, and for the benefit of the receivership bank, said title did not, under the national banking laws, pass, by operation of law, to petitioner as successor receiver, and consequently that title to said property passed to the heirs of said Robert C. Miller.

(4) That the operation and effect of said deeds of the Special Commissioner to said Robert C. Miller, were governed by the general law of West Virginia to the effect that "where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually."

## V.

## Questions Presented.

(1) Under the national banking laws, as construed by the courts, does the receiver of a national bank who has been duly authorized to purchase real property on behalf of his receivership, have capacity and power to take title to said property in his name, in his fiduciary and representative capacity, as receiver of said bank, or must said title

in terms be conveyed to, and in the name of, the receivership bank as a corporation, in order to avoid the consequence of title passing to said receiver in his individual and personal capacity?

(2) Upon the death or resignation of a receiver of a national bank, do the receivership assets pass, by operation of the national banking laws, from the predecessor receiver to his successor?

(3) Does the law of West Virginia, to the effect that: "Where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually", apply to deeds purporting to convey title of real property to a national bank receiver in his fiduciary or representative capacity as receiver?

## VI.

### Contentions of Petitioner.

(1) Section 5234 of the Rev. Stats. (U. S. C. title 12, ch. 2, sec. 192) provides that upon appointment of a receiver for a national bank, said receiver, under the direction of the Comptroller of the Currency, shall take possession of the assets of said bank, collect and liquidate debts and obligations belonging to it, and, upon the order of the court of record of competent jurisdiction, said receiver may sell all of the real and personal property of the bank; and that all money received by him from such liquidation, shall be paid to the Treasurer of the United States, subject to the order of the Comptroller of the Currency (Appendix, p. 22).

Said statute does not, in terms, specify whether title to the receivership assets shall remain and continue in the national bank as proprietor or owner, or whether title shall pass to the receiver.

However, the decisions of this Court have held, in substance, that title to the assets of the bank pass, by operation of law, to the receiver as a statutory assignee. In *Kennedy* v. *Gibson, et al.* (1869), 8 Wall. 498, 506, this Court said:

> "The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit."

Other cases to the same effect:

*Scott* v. *Armstrong,* 146 U. S. 499, 506;
*Earle* v. *Pennsylvania,* 178 U. S. 449, 455;
*Fish* v. *Olin* (Vt.), 56 Atl. 533, 534, 76 Vt. 120;
*Anderson* v. *Cronkleton,* 32 F. (2d) 170, 171.

The Act of March 29, 1886 (U. S. C. title 12, ch. 2, secs. 198-200) (Appendix, p. 22) provides, in effect, that when properly authorized by the Comptroller of the Currency and by the Secretary of the Treasury, the Receiver of a national bank may, for the protection of the receivership interests, purchase property at execution sale and may expend the funds of the receivership in payment for the property.

The foregoing statutory provisions do not indicate or specify whether title shall be taken in the name of the receiver in his fiduciary or representative capacity, or whether title shall be taken in the name of the national bank as a corporation.

*Examination of the authorities indicates that apparently this question has not been passed upon by the courts.* However, it would seem necessarily to follow that inasmuch as it has been decided by this Court by the cases above

cited, that title to the assets of the receivership bank passes to the receiver as statutory assignee, and that suits on behalf of the bank may be brought in the name of the receiver, the conclusion should also be reached that under said Act of March 29, 1886, *supra*, it was intended, or at least permitted, that title to the property thus purchased could be taken in the name of the receiver in his fiduciary or representative capacity as receiver.

It has long been the construction of said Act of March 29, 1886 by the Comptrollers of the Currency, and, in consequence thereof, it has long been the settled practice, that title to real property acquired under authority of said statute should be taken in the name of the receiver in his fiduciary or representative capacity, rather than in the name of the bank as a corporation.

This Court has uniformly held that great weight may properly be given to settled construction of a statute by the Executive Department charged with its administration, and that such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson* (1929), 280 U. S. 183, 193; *Heath* v. *Wallace* (1891), 138 U. S. 573, 582; *Brewster* v. *Gage* (1929), 280 U. S. 327, 336; *Inland Waterways Corp.* v. *Young* (1940), 309 U. S. 517, 524; *Rawlings* v. *Ray* (1941), 312 U. S. 96, 99.

No question is raised concerning the fact that receiver Miller had been duly authorized to purchase the real property in question and to pay for the same from the funds of the receivership. (*Supra*, p. 3).

In view of the foregoing, it would seem clear that the general rule of property law of West Virginia to the effect that "Where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually", has no application to

the deeds executed to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association". The doctrine established by cases such as *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, does not require, nor permit, under the circumstances of the instant case, that the aforesaid rule of West Virginia property law apply to the aforesaid deeds.

(2) There is no provision in the national banking laws specifically indicating that upon the death or resignation of a receiver of a national bank, the title to the receivership assets shall pass to and vest in the successor receiver.

*Examination of the reported cases seems to indicate that there are no decisions of this Court, or any other court, passing upon this question.*

It has long been the position of the Comptrollers of the Currency, that upon the death or resignation of a receiver of a national bank, the title to the assets acquired by said receiver as statutory assignee, does pass, by operation of the national banking laws, to his successor receiver. Under the doctrines established in the cases previously cited, *supra* (p. 12) it would seem that this interpretation and construction of the law by the Comptroller should not be disturbed. It is obvious that a contrary interpretation or construction to the effect that title does not pass from a receiver to his successor receiver, by operation of law, and that deeds of conveyance from the predecessor receiver, or his heirs, must be obtained, or that suits to establish title in the successor receiver must be filed, would seriously interfere with the liquidation of the receivership. A construction of the law having such consequences should not be adopted unless the previous position was clearly wrong, or unless a different construction is plainly required.

The sound construction of the law upon this point would seem to be that title to the receivership assets is, in legal

effect, attached to, and vested in, the official office of receiver, and that changes from time to time in the incumbents of that office do not change or affect the situs of title and consequently that each successor receiver in turn takes title as substituted statutory assignee.

Some help, in this connection, would seem to be derived, by analogy, from the provisions of section 11(a) of the Act of Congress of February 13, 1925 (U. S. C. title 28, c. 18, secion 780, appendix, p. 24) wherein it is provided, in effect, that upon the death or resignation of an officer of the United States during the pendency of a suit relating to the discharge of the official duties of such officer, the court may permit the substitution of the successor in office of such officer. This statutory provision seems to recognize that the cause of action, and the rights incident thereto, are vested in the official office of said public officer, and not in said officer individually or personally. The following cases, construing said statute or similar statutes, seem to support this construction:

*Bowers, Collector of Internal Revenue* v. *American Surety Co.*, 30 F. (2d) 244;
*Brown-Crummer Inv. Co. of Wichita, Kan., et al.* v. *City of Florala, Ala., et al.*, 55 F. (2d) 243;
*Sadler, Overseer of Poor* v. *Jeppson*, 82 Atl. 316-317;
*Commonwealth* v. *Southern Pac. Co.*, 105 S. W. 466-468;
*Thomas B. Bishop Co.* v. *Santa Barbara County, et al.*, 96 F. (2d) 199-203.

It is settled doctrine that the receiver of a national bank is an officer of the United States, and is the agent or representative of the Comptroller of the Currency, for the purpose of the administration of the receivership bank, and for the liquidation of its assets. See *Kennedy* v. *Gibson, et al.*, and other cases, cited, p. 11, *supra.*

It is a general rule that the title, rights and powers of a trustee are annexed to the office, so as to pass to, and be capable of being dealt with and exercised by, a successor of the original trustee, without any conveyance or assignment to the new trustee by the retiring trustee. *Lahey* v. *Kartright* (Court of Appeals, N. Y. 1892) 132 N. Y. 450, 30 N. E. 989, 990; *Copple* v. *Morrison,* (Iowa, 1935) 264 N. W. 113, 115; *In re Doe's Will* (Wisc. 1939) 285 N. W. 764, 767; *First Trust Co.* v. *Airedale Ranch & Cattle Co.* (Nebr. 1939) 286 N. W. 766, 771; *Thomas* v. *Nat. Bank of Commerce,* (Wash. 1936) 60 Pac. (2d) 264, 269; *Gregory* v. *Merchants State Bank,* (Tenn. 1939) 135 S. W. (2d) 465, 474; *Stearns* v. *Fraleigh,* 39 Fla. 603, 23 So. 18, 21; *Coleman-Bush Inv. Co.* v. *Figg,* 95 Ky. 403, 25 S. W. 888; *Stokes* v. *Amerman* (Sup. Ct. N .Y. 1889) 7 N. Y. S. 733, 734; *Fatjo* v. *Swasey,* 111 Calif. 628, 44 Pac. 225.

In the absence of a clear intention to the contrary, the power of sale conferred on a trustee is annexed to the office and passes to any person lawfully substituted in the place of the original trustee. *Lahey* v. *Kartright* (Court of Appeals N. Y. 1892) 132 N. Y. 450, 30 N. E. 989, 990; *Freeman* v. *Prendergast,* 94 Ga. 369, 21 S. E. 837, 844; *Haggin* v. *Straus,* 148 Ky. 140, 146 S. W. 391, 395; *Safe Deposit & Trust Co.* v. *Ellis,* 136 Md. 334, 110 Atl. 481, 483; *Strite* v. *Wolf,* 268 Pa. 221, 110 Atl. 753, 754; *Royce* v. *Adams,* 123 N. Y. 402, 25 N. E. 386.

The courts have held that on appointment of a new trustee, title to the trust property vests in him by virtue of the appointment, and without necessity of a formal conveyance. *Thomas* v. *Nat. Bank of Commerce,* (Wash. 1936) 60 Pac. (2d) 264, 269; *Gregory* v. *Merchants State Bank,* (Tenn. 1939) 135 S. W. (2d) 465, 474; *Freeman* v. *Pendergast, supra; Parkhill* v. *Doggett,* 135 Ia. 113, 112 N. W. 189, 190; *Toronto General Trust Co.* v. *Chicago, B. & Q. R. Co.,* 123 N. Y. 37, 25 N. E. 198, 200; *Woodridge* v.

*Planters Bank*, 1 Sneed (Tenn.) 297, 302; *McCallum* v. *Wing*, ( C. C. A. 1st, 1929) 30 F. (2d) 505, 510.

## VII.

### Federal Question.

It would seem clear that the instant case raised Federal questions within the purview of Sec. 237 (b) of the Judicial Code.

Respondent, in denying the acquisition of title to the real property by petitioner, and in denying that the receiver's bill of complaint presented a cause of action to compel respondent to perform specifically the contract of sale, raised certain points in his demurrer (R. 133-137), which points in turn, by reason of the decision of the trial court against respondent,—were reproduced and set forth in the "Certification Order" presented to the court below (R. 2-5). As previously indicated herein under "Questions *Presented*", *supra*, p. 9, respondent contended, and the court below ruled, that under the national banking laws, petitioner's predecessor, as receiver, did not have capacity or power to take title to the real estate in his name, even though taken in his name in his fiduciary or representative capacity, and that title passed to receiver Miller individually. The point was also made, in this connection, that under the national banking laws, title should have been taken in the name of the bank as a corporation.

It was further contended by respondent, and ruled by the court below in favor of respondent, that even if it were to be assumed that legal title to the property did pass to petitioner's predecessor in his fiduciary or representative capacity, there was no provision in the national banking laws whereby title passed or could pass, by operation of law, from petitioner's predecessor to petitioner as successor receiver.

On the other hand, petitioner contended that under the settled construction of national banking law, title to real estate purchased on behalf of the receivership, with receivership funds, by direction of the Comptroller of the Currency and the Secretary of the Treasury, could lawfully be acquired by the receiver in his fiduciary or representative capacity; and that upon the death or resignation of a receiver, title passed by operation of the national banking laws to his successor receiver.

It was also contended by respondent, and ruled in its favor by the court below, that the effect and operation of the deeds in question were governed by West Virginia laws and that under said law title passed to petitioner's predecessor in his individual capacity and hence thereafter passed to heirs at law of petitioner's predecessor. *On the other hand, petitioner contended that these questions were controlled by the national banking laws, as interpreted and construed by the courts.*

As previously herein pointed out, *supra*, p. 7, the decision of the court below was predicated primarily on its construction and interpretation of the national banking law, and in its opinion (R. 145) the court stated:

> "In order that the questions involved in this certificate may be properly discussed, it is necessary to consider the effect of the appointment of a receiver for a national banking association by the Comptroller of the Currency, as well as the authority and powers of the receiver so appointed."

This Court has held that where the receiver of a national bank claims rights under the national banking laws, and such rights were denied by a State court, a Federal question is involved. *Seabury, Receiver* v. *Green* (1935), 294 U. S. 165, 168.

## VIII.

### Finality of Judgment.

It would seem clear that the judgment of the court below is final within the purview of Sec. 237(b) of the Judicial Code.

Petitioner, by the bill of complaint in the instant case, set forth therein, fully and completely the derivation of title of the property in question, and the alleged accrual and vesting of said title in petitioner, and sought to compel respondent to carry out its contract for the purchase of said property. Respondent, for the reasons hereinbefore indicated, denied petitioner had title to said property, and denied, therefore, the claim or right of petitioner to compel respondent to perform said contract and purchase said property. The court below sustained the contention of respondent and held that petitioner, as receiver of the bank, did not have title to the property, and further, by necessary implication and inference, held that the bank did not have title to said property, and accordingly decided that petitioner could not compel specific performance of the contract.

The merits of the case, involving the claim of title by petitioner, and the denial of title by respondent, were thus adjudicated by the court below upon the merits, and nothing remained to be done by the trial court, so far as respondent's liability was concerned. The judgment of the court below thus disposed completely of the controversy.

The decisions of this Court have established that where title to property is decided upon the merits by the highest court of a State, such decision is final. As stated by this Court in *Forgay et al.* v. *Conrad,* 6 How. 200, 204:

> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is

entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

The question of finality of judgment, so far as right of appeal was concerned, was in issue in *Ex Parte Tiffany*, (1920) 252 U. S. 32. The language of the opinion of this Court is applicable by analogy to the instant case.

"By the Judicial Code, sec. 128, the Circuit Court of Appeals is given appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, with certain exceptions not necessary to be considered. It is clear that the order made in the District Court refusing to turn over the property to the chancery receiver was a final decision within the meaning of the section of the Judicial Code to which we have referred, and from which the chancery receiver had the right to appeal to the Circuit Court of Appeals. By the order the right of the state receiver to possess and and administer the property of the corporation was finally denied. The words: 'final decisions in the district courts' mean the same thing as 'final judgments and decrees' as used in former acts regulating appellate jurisdiction. Loveland on Appellate Jurisdiction of Federal Courts, sec. 39. This conclusion is amply sustained by the decisions of this court. *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545; *Krippendorf* v. *Hyde*, 110 U. S. 276, 287. See also a well considered case in the Circuit Court of Appeals, Ninth Circuit—*Dexter Horton National Bank* v. *Hawkins*, 190 Fed. Rep. 924."

In ruling upon this question in *Thomson* v. *Dean*, 7 Wall. 342, 345, the court said:

"So far as the court below was concerned, the decree in the case determined the principal matter in con-

troversy between the parties. *And since the decree could not be changed except through a new and distinct proceeding, it determined that matter finally.*" (Italics inserted.)

Also see: *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44; *Gumbel* v. *Pitkin*, 113 U. S. 545; *Clark, Rec.* v. *Williard, et al.*, 292 U. S. 112.

## IX.

**Reasons Relied Upon for Requested Allowance of Writ.**

(1) The decision of the court below, to the effect that a receiver of a national bank cannot take title in his own name in his representative or fiduciary character as receiver, of real estate acquired on behalf of the receivership during the course of liquidation—would seem to be directly in conflict, in principle, with the decisions of this Court in the case of *Kennedy* v. *Gibson, et al.*, and of the other cases, cited on p. 11 hereof, to the effect that the receiver is a statutory assignee of the assets of a national bank and that title to such assets passes to him as receiver.

The decision of the court below, to the effect that under the national banking laws title to assets of the receivership does not pass, by operation of law, to a successor receiver, would likewise seem contrary to the principles established by the aforesaid cases cited on pp. 14-15 hereof, and in *Kennedy* v. *Gibson, et al., supra*, p. 11.

(2) However, examination of the authorities, seems to indicate that neither of the foregoing points has heretofore been specifically passed upon by this Court, and the questions would seem to be of such general importance, incident to the interpretation and construction of the national banking laws, that this Court should grant the writ of *certiorari* for the purpose of settling the law.

(3) As indicated in the discussion herein, *supra*, p. 12, it has long been the established construction and interpreta-

tion by the Comptroller of the Currency of the national banking laws upon the foregoing points, that title may properly be taken by receivers of national banks of real estate acquired by them, and that, upon the death or resignation of a receiver, title to the receivership assets passes, by operation of law, to his successor receiver.

Many parcels of real estate thus acquired, by receivers of national banks all over this country, have been sold.

If the decision of the court below is permitted to stand, serious doubt upon the validity and effectiveness of titles to real estate thus acquired and thus sold by receivers of national banks will result. In this connection, attention is also directed to the statements in the petition for rehearing (R. 150-152) concerning the effect of the decision.

It is believed that these consequences are of such importance that this Court may well feel justified in granting the review.

(4) The decision of the court below, as applied in the instant case, seriously affects the administration by the Comptroller of the Currency of the national banking laws relating to the liquidation of national banks in receivership, and, therefore, in the interest of future guidance of the Comptroller in these respects, it is believed the law should be settled by an authoritative decision from this Court.

Respectfully submitted,

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